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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 778 and 779

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF STATE OF NEW JERSEY TO AFFIRM JUDGMENT UPHOLDING I.C.C. INCLUSION ORDER

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MOTION OF STATE OF NEW JERSEY TO AFFIRM JUDGMENT UPHOLDING I.C.C. INCLUSION ORDER

Motion to Affirm

Appellee New Jersey, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to affirm the judgment of the statutory three-judge court in the Southern District of New York insofar as it upholds the

order of the Interstate Commerce Commission (I.C.C.) approving the application of Erie-Lackawanna for inclusion in the Norfolk & Western system.*

Opinion Below

The opinion of the statutory three-judge court in the Southern District of New York has not yet been reported but is attached to Norfolk & Western's jurisdictional statement as Appendix B. The Interstate Commerce Commission's Order of June 9, 1967 requiring inclusion of Erie-Lackawanna in the Norfolk & Western system is reported at 330 I.C.C. 328 (1967).

Interest of New Jersey

The State of New Jersey enacted legislation in 1967 which permits long term contracts between the state and railroads to provide for vital railroad passenger service. Laws of 1967, Chapter 71, N.J.S.A. 27:1A-5 (Appendix A). Erie Lackawanna is a major rail carrier of passengers in New Jersey and it is in New Jersey's interest to continue Erie-Lackawanna as a viable railroad.

Statement

The State of New Jersey is served by the Erie-Lackawanna Railroad. It has approximately 335 miles of railroad in New Jersey. It carries approximately 35,000 passengers daily, most of them commuters to Newark and New York primarily from Bergen, Passaic, Essex, Union and Morris Counties. *In the Matter of the Petition of Erie-Lackawanna for Permission to Discontinue Its Passenger Service in New Jersey,* N. J. P. U. C. Docket 661-8, 63 P.U.R. 3rd 607 (1966).

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* The I.C.C. also approved the inclusion of Delaware & Hudson and Boston & Maine in the Norfolk & Western system.

The State of New Jersey has embarked upon an ambitious program of rehabilitation of its passenger carrying railroads. The state legislature expressed its concern over rail passenger service in New Jersey when it enacted the Laws of 1964, Chapter 88.* This legislation committed the

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* The Legislature hereby finds and determines that:

(a) Commuter and suburban rail passenger and ferry service between points within this State and between points in this State and in adjacent metropolitan areas in other States as now operated results in a financial loss to each of the respective railroad and ferry carriers;

(b) Continuation of these losses will lead to attempts to discontinue vital commuter and suburban rail passenger and ferry service, as well as to increase the passenger fares applicable to such service;

(c) Substantial curtailment of present commuter and suburban rail passenger and ferry service will increase highway congestion which will require the expenditure of many millions of dollars by the State and its counties and municipalities and other agencies for the construction of additional roads, bridges and tunnels;

(d) Substantial curtailment of present commuter and suburban rail passenger and ferry service will adversely affect economic values in large portions of the State to the detriment of the people of the entire State;

(e) It is essential to the public health, safety and welfare and to development of the industrial potential of the State that commuter and suburban rail passenger and ferry service be preserved, and improved, if possible, at least until it is determined whether more efficient and desirable alternative means of transportation can be economically provided;

(f) The facilities of railroads and ferries providing necessary commuter and suburban rail passenger and ferry service are an essential part of the State's public transportation system, and it is in the public interest under all conditions now foreseeable that they be preserved and improved and that to this end contracts be made between the

(Footnote continued on following page.)

state to contract with the passenger carrying railroads for preservation of essential passenger service.

In order to carry out its program to rehabilitate and improve railroad passenger service there must be a financially sound railroad to provide the service. The Interstate Commerce Commission has determined that Erie-Lackawanna Railroad is unable to survive as an independent carrier in the face of an impending Penn-Central merger. *Pennsylvania Railroad Co. Merger New York Central Railroad Co.*, 327 I.C.C. 475, at 529 (1966).

New Jersey seeks affirmance of the I.C.C. order requiring inclusion of Erie-Lacakawanna in the Norfolk & Western system to enable New Jersey to continue in its program aimed at improvement of the rail passenger service as dictated by the requirements of public convenience and necessity for the people of New Jersey.

ARGUMENT

The State of New Jersey participated in the proceedings before the Interstate Commerce Commission (I.C.C.) in support of Erie-Lackawanna (E-L) Railroad Company's inclusion in the Norfolk and Western Railway Company (N&W) system.

(Footnote continued from preceding page.)

State and the railroads and ferry companies operating such facilities providing for necessary commuter and suburban rail passenger and ferry service by the railroads and ferry companies in return fo payment to each contracting railroad and ferry company by the State, out of such appropriation or appropriations as may be made by the Legislature, or from such other funds which may be made available from time to time, of amounts not exceeding the value to the State of the consideration received or to be received by the State and the service to the public so rendered by such railroad or ferry company. L. 1964, c. 88, §1.

When the I.C.C. approved the merger of the New York, Chicago and St. Louis Railroad Company (Nickel Plate) the Wabash Railroad Company (Wabash), with the N.&W. and others it imposed a condition as follows:

> "1. For a period of 5 years following the date of the order herein the Commission will retain jurisdiction to permit the filing of petitions by the Erie-Lackawanna Railroad Company, The Delaware and Hudson Railroad Corporation, and the Boston and Maine Railroad for inclusion in the Norfolk & Western system. Upon the filing of such petition or petitions, the attendant facts and circumstances will be appraised upon the basis of an appropriate record or records then to be compiled, and if the affiliation or affiiliations then sought, or some reasonable modification thereof, be found consistent with the public interest, the Commission will direct the accomplishment thereof under such terms as may be found equitable to all parties involved. It is not intended that acceptance of this condition by applicants herein will foreclose or limit review of any decision of the Commission disposing of a petition filed pursuant to this condition.
>
> 2. • • •
>
> 3. Consummation by the applicants of any transaction approved herein shall constitute on the part of such applicants acquiescence in and irrevocable assent to the conditions stated in this appendix."

Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railway Co. Merger, 324 I.C.C. 1 (1964) at p. 148.

There is no question respecting the authority of the I.C.C. to impose such conditions. See 49 U.S.C. 5(2)(d).* *New Orleans & New Orleans Railway Co.* v. *Bozeman*, 312 F. 2d 264 (1963); *Alabama Highway Express Inc.* v. *U. S.*, 241 F. Supp. 290 (1965) aff'd. 382 U. S. 106 (1965); *Walker* v. *U. S.*, 208 F. Supp. 388 (1962) aff'd. 372 U. S. 526 (1963).

N&W now seeks to impose an additional condition before it takes Erie-Lackawanna, Delaware and Hudson and Boston and Maine into its family, and that is an approval of a merger between N&W and B&O-C&O, with the Reading and Central Railroad of New Jersey (C.N.J.) included in a subsidiary made up of E-L, D&H and B&M.

The I.C.C. wisely refused to defer a determination in the E-L inclusion case until after a decision was made in the N&W-C&O plan. This would only prolong the delay and put E-L in further jeopardy should Penn-Central be consummated.

Specifically, N&W urged in the court below that New Jersey has not firmly committed itself to continue the assistance payments. The court below succinctly summarized the the estimated increase in earnings E-L would enjoy as a result of New Jersey's action.

	In Millions
"1. Exemption of passenger service facilities from property taxation	$0.7

* (d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inculsion, and upon a finding that such inclusion is consistent with the public interest.

2. Discontinuances already authorized by N. J. Board of Public Utility Commissioners	2.0
3. N. J. property tax reduction	1.3
4. Assistance payments	3.5
	$7.5"

J.S. B-41.

It then properly held that the I.C.C. could not be expected to furnish a concrete guarantee of what the State Legislature would do in the indefinite future.

New Jersey is ready to do its part to comply with the mandate of the I.C.C. in *New York, New Haven & Hartford Railroad Co., Trustees Discontinuance of all Interstate Passenger Trains,* 327 I.C.C. 151 (1966) at p. 222.

> "In matching the reasonable effort of the railroads to sustain and improve essential passenger services, the public through its governmental representatives must be willing to provide a reasonable level of support for those services. As we have said, this should not be interpreted as requiring a willingness by the public to 'pay the bill' as tendered by the carrier or carriers providing such services at a deficit. Yet, it must imply something more than a mere willingness to provide only that financial assistance which is necessary to sustain such services, and possibly the financial condition of the carrier offering them, at a point just short of collapse.
>
> We believe that the reasonable level of public support should in fact be construed as that level of financial or other public assistance which will stimulate the carrier to initiate or, if already initiated, con-

tinue its own reasonable effort to sustain and improve essential and economically viable passenger services. This, we think, is the kind of creative cooperation which will most productively revitalize and invigorate the operation of America's privately-owned rail passenger operations.

Such public support should not, of course, be limited solely to the contribution of direct or indirect financial assistance to railroads. Beyond this, it must encompass joint governmental-carrier programs to determine, on the basis of current and projected demand patterns, what rail passenger services actually are essential to the public, and at what level they should be maintained or modified. As we already have discussed within the context of this case, such determinations will in turn enable the rational restructuring of rail passenger services and underlying facilities; the rational investment of capital, research and technological skills in the future of such essential operations, and the rational reformation of rate and service concepts no longer responsive to public demand or productive of acceptable levels of patronage and revenue."

N&W's solicitous concern for Reading and C.N.J. before the I.C.C. should more appropriately be the concern of its marriage partner the C&O-B&O system. The I.C.C. found that C&O-B&O either controlled Reading or had the power to control Reading which in turn controls C.N.J. now in the process of reorganization. *Western Maryland Control by C&O-B&O,* 328 I.C.C. 684 (1967). C&O-B&O are certainly in a position to rehabilitate these railroads rather than impose them upon the I.C.C. as part of a package intended to make proposed merger of the N&W and the C&O-B&O more palatable.

CONCLUSION

For the foregoing reasons, the judgment of the District Court insofar as it affirms the I.C.C. Order requiring N.&W. to take in the Erie-Lackawanna should be affirmed.

Respectfully submitted,

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Attorney for Appellee, State of New Jersey.

WILLIAM GURAL,
Deputy Attorney General,
Of Counsel.

[APPENDIX FOLLOWS]

APPENDIX A

Chapter 71—Laws of 1967 (New Jersey)

TITLE

AN ACT to amend "An act establishing and concerning a Department of Transportation as a principal department in the Executive Branch of the State Government, establishing therein a Commuter Operating Agency, providing an appropriation therefor, repealing chapter 88 of the laws of 1964, and supplementing Title 27 of the Revised Statutes," approved December 12, 1966 (P.L. 1966, c. 301).

27:1A-5. *Functions, powers and duties of commissioner.* The commissioner, as head of the department, shall have all of the functions, powers and duties heretofore vested in the state highway commissioner and shall, in addition to the functions, powers and duties invested in him by this act [chapter] or by any other law:

(a) Develop, from time to time revise and maintain a comprehensive master plan for transportation development;

(b) Develop and promote programs to foster efficient and economical public transportation services in the state;

(c) Prepare plans for the preservation and improvement of the commuter railroad system;

(d) Develop plans for more efficient public transportation service by motor bus operators; develop statistics, analyses, and other data of use to bus operators in the pro-

vision of public transportation service; facilitate more effective co-ordination between bus service and other forms of public transportation, particularly the commuter railroads, review petitions for motor bus franchises in areas served by the commuter railroad system and make appropriate recommendations on such petitions;

(e) Co-ordinate with transportations activities of the department with those of other public agencies and authorities;

(f) Co-operate with interstate commissions and authorities, state departments, councils, commissions and other state agencies, with appropriate federal agencies, and with interested private individuals and organizations in the co-ordination of plans and policies for the development of air commerce and air facilities; and

(g) Make an annual report to the governor and the legislature of the department's operations, and render such other reports as the governor shall from time to time request or as may be required by law.

SOURCE. I. 1967, c. 71, § 1. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §5, approved Dec. 12, 1966.

27:1A-15. *Definitions.* Hereinafter in this act [chapter], unless the context indicates another or different meaning or intent:

(a) "Carrier" shall mean any individual, copartnership, association, corporation, joint stock company, receiver or trustee operating any railroad or motor bus in this state or between points in this state and between points in other states, for public use;

(b) "Agency" shall mean the commuter operating agency;

(c) "Passenger service" shall mean the operation of railroad trains to carry commuter and other passengers in this state or between points in this state and between points in other states, or the operation of motor buses to transport passengers in this state or between points in this state and points in adjacent states;

(d) "Improvements to capital facilities" shall mean in connection with passenger service the acquisition, construction, reconstruction, relocation, removal, establishment or rehabilitation of passenger stations and terminals, automobile parking facilities, track connections, signal systems, power systems, roadbeds, equipment storage and servicing facilities, bridges, grade crossings, railroad passenger cars, locomotives and motor buses, wherever such improvements are included in determinations filed as required by section 17 of this act.

SOURCE. L. 1967, c. 71, §2. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §15, approved Dec. 12, 1966.

27:1A-16. *Commuter operating agency; members; employees; exercise of powers and duties; minutes, veto by governor.* (a) There is hereby established in the department of transportation the commuter operating agency which for civil service purposes shall be considered to be a board.

(b) The agency shall consist of 4 members who shall be the commissioner of transportation, the assistant commissioner for public transportation, the state treasurer and the

president of the board of public utility commissioners, or their respective designees.

(c) The commissioner and the assistant commissioner for public transportation shall be the chairman and secretary, respectively, of the agency. The executive director of the agency shall be an officer of the department so designated by the commissioner in writing, which designation shall be filed with the secretary of state. Such designation shall continue in effect until the commissioner shall, in the manner herein provided, designate another officer in the department as such executive director. The executive director shall have such powers and duties as are delegated to him by the agency from time to time.

(d) The commissioner shall assign to the agency such employees of the department as may be necessary for the efficient operation of the work of the agency. The agency may also appoint, retain and employ, to serve at its pleasure, a director of operations and a deputy director of operations, and it shall determine their qualifications, duties, services and compensation.

(e) The powers of the agency shall be vested in the members thereof and 3 members of the agency or their designees shall constitute a quorum at any meeting thereof. Action may be taken and motions and resolutions adopted by the agency at any meeting thereof by the affirmative vote of at least 3 members or their designees. No vacancy in the membership of the agency shall impair the right of a quorum to exercise all the rights and perform all the duties of the agency.

(f) A true copy of the minutes of every meeting of the agency shall be forthwith by and under the certification of

the secretary thereof, to the governor. No action taken at such meeting by the agency shall have force or effect until 10 days after such copy of the minutes shall have been so delivered. If, in said 10-day period, the governor returns such copy of the minutes with veto of any action taken by the agency or any member thereof at such meeting, such action shall be null and of no effect.

SOURCE. L. 1967, c. 71, §3. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §16, approved Dec. 12, 1966.

27:1A-18. *Contracts with rail carriers; hearings.* In order to conserve and improve passenger service necessary for public use now and in future years in this state, but subject to the limitations of this act [chapter], the state of New Jersey, acting by and through the agency, may enter into contracts with any rail carrier, providing for acceptance by such carrier of all or any part of the agency's determination. Prior to entering into any such contract, the agency shall hold public hearings where it shall make known the terms and conditions of the proposed contract to interested parties and the general public. Every contract entered into pursuant to this section shall be subject to the following terms and conditions:

(a) Contracts involving expenditure of public funds for improvements to capital facilities shall require continuance of specified passenger service by the carrier for stated periods not limited to a fiscal year, and shall further require that title to such improvements shall be vested with the state, except that where public funds are expended to repair or rehabilitate existing facilities, such title to or other interest in such improvements as the carrier may

have shall be the subject of negotiation between the agency and the carrier.

(b) No such contract shall provide for payments by the state for service rendered with respect to such fiscal year in excess of the loss from passenger service during the previous calendar year as shown in the determination for that fiscal year. If during any contract period a carrier shall realize a profit from the passenger service contracted for, which profit exceeds a return on investment of 6%, ½ of the excess shall be paid to the agency. The accounting procedures to be employed to determine the extent of any profit or loss, as the case may be, shall be a subject of negotiation between the parties to the contract.

(c) Every such contract shall describe the passenger service which the carrier shall be required to operate. Such description shall set forth the operation of the contracted service which shall include timetables, train consists and fair tariffs applicable to the service and any other provisions that the agency may deem reasonable.

SOURCE. L. 1967, c. 71, §4. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §18, approved Dec. 12, 1966.

27:1A-19. *Contracts with motor bus carriers.* The agency may enter into contracts with any motor bus carrier to operate passenger service which the agency shall determine (a) to be necessary to provide or encourage adequate commuter or intercity bus service and (b) would not otherwise be provided or made available without state assistance. Payment by the agency for such passenger service shall be based on the actual cost of such service to the motor bus carrier plus a 6% return on investment.

Appendix A

The agency may also enter into contracts with any motor bus carrier pursuant to which the agency may acquire, purchase or rehabilitate motor buses for lease to such carrier to be operated in specified passenger service, provided that any state funds expended for such programs are at least matched by federal funds.

SOURCE. L. 1967, c. 71, §5. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §19, approved Dec. 12, 1966.

27:1A-22. *Terms of contracts.* Each contract shall contain conditions, terms and provisions as the agency may require including, but not limited to, provisions permitting or relating to (a) determination of contracted service satisfactorily operated, (b) deductions or penalties with respect to unsatisfactory service, (c) auditing and settlement of payments, (d) termination, waivers, release, modification or other effect in event of nonperformances, or of strikes, riots, disasters, acts of God or condition not caused or permitted by the carrier or within its control, (e) additional obligations of the carrier, and (f) any such other matters as the agency deems to be in the public interest. Any such contract may also provide for the rendering of additional service by the carrier, on an experimental basis or for an experimental period or otherwise, and for the payment by the state of additional compensation not exceeding the estimated actual cost of such additional service to the carrier, which additional compensation shall not be limited by the provisions of the first sentence of section 18(b).

SOURCE. L. 1967, c. 71, §6. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §22, approved Dec. 12, 1966.

27:1A-24. *Petition for changes; public hearing; jurisdiction of board of public utility commissioners.* Every carrier entering into a contract shall be obligated to continue during the term of the contract all existing passenger service and fares applicable thereto, except that the contract shall afford the carrier the right to petition the agency for changes in passenger service and applicable fares during the term of the contract. If such a petition includes an application to decrease the number of trains, a substantial change in schedules or an increase in fares, the agency, prior to making any determination with respect thereto, shall hold a public hearing on notice. In acting on any such petition the agency shall give due consideration to the following factors:

(a) The availability of alternative means of public transportation.

(b) The potential cost of continuing the service sought to be curtailed or discontinued.

(c) The cost to the state of providing alternative transportation facilities either by common carriers or highway improvement.

(d) The resulting effect on state and local population trends, economic values and tax revenues.

The authority hereby given the agency with respect to the discontinuance, curtailment, abandonment or change in passenger service shall be exercised during the contract period without regard or reference to the jurisdiction vested in the board of public utility commissioners by section 48:2-24 of the Revised Statutes. At the conclusion of the

contract period the board of public utility commissioners shall resume such jurisdiction but no carrier shall be required to restore any service discontinued as aforesaid unless the board of public utility commissioners shall determine, after notice and hearing, that the service is required by public convenience and necessity.

Notwithstanding any other provisions of this act [chapter], all vehicles used by any motor bus carrier pursuant to contracts authorized by this section shall be subject to the jurisdiction of the board of public utility commissioners with respect to insurance, maintenance, specifications and safety to the same extent such jurisdiction is conferred upon the board by Title 48, Public Utilities, as amended and supplemented.

SOURCE. L. 1967, c. 71, §7. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §24, approved Dec. 12, 1966.

27:1A-29. *Commuter advisory committee; members.* There is hereby established in the departmentment of transportation a commuter advisory committee. Such committee shall consist of the assistant commissioner for public transportation as chairman, and 10 other members appointed by the governor as follows: 2 citizens of the state who are commuters; 2 mayors of municipalities or members of boards of chosen freeholders of counties served by railroads under contract to the state; 2 officials of unions representing employees of railroads under contract to the state; 2 officials of railroads or motorbus carriers under contract to the state; and 2 public members who shall be citizens of the state.

SOURCE. L. 1967, c. 71, §8. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §29, approved Dec. 12, 1966.